STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EM25HB-64615
EEOC CHARGE NO. 17E-2014-00419

Maria Napolitano,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
Northfield Bank,	)	
	)	
Respondent.	)	

On June 20, 2014, Clark resident Maria Napolitano (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Northfield Bank (Respondent), refused to grant her a reasonable accommodation that would have allowed her to perform the essential functions of her job and then terminated her employment, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of disability discrimination in their entirety. DCR's ensuing investigation found as follows.

Respondent operates thirty full service banking offices in New York and New Jersey. On January 1, 2012, it hired Complainant to work as a customer service representative (CSR) in its Westfield branch where her responsibilities included serving customer needs, meeting sales goals, and maintaining accounts. During the relevant time, the branch was staffed by five full-time employees: a branch manager, assistant branch manager, one CSR, and two tellers.

On our about June 19, 2013, Complainant was involved in a car accident unrelated to her work. Respondent's Medical Leaves of Absence Policy states:

> A leave of absence will be granted to regular full time employees and part-time employees whose health condition renders them unable to perform the functions of their job with or without a reasonable accommodation. This leave will begin after the expiration of the 12-week leave provided by our Family and Medical Leave Policy for workers eligible for FMLA leave . . .
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> . . . The leave of absence initially will be for a period of up to one month. It may be extended, on a month-by-month basis, up to a maximum of three months of total absence upon written request to the Director of Human Resources with proof of a continuing inability to return to work. [1]

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1 During the course of the investigation, HR Manager for Payroll & Benefits Aline Silva clarified that such requests should be submitted to her rather than the HR Director.

From October 30, 2013, through January 21, 2014, Complainant was on FMLA leave for injuries related to the car accident. On January 20, 2014, she submitted a doctor's note to HR Manager for Payroll & Benefits Aline Silva, stating that she was scheduled to have shoulder surgery on February 5, 2014, and would be out of work for approximately twelve weeks afterwards (which would have required extending her leave to approximately May 5, 2014). That same day, i.e, January 20, 2014, Respondent granted her an additional thirty days of leave.

On February 18, 2014, Silva sent a letter to Complainant stating that she had exhausted her FMLA leave and was approaching the end of the additional thirty day leave, and that no further leave would be granted. The letter stated, in part:

> Your Family Medical Leave Act (FMLA) began on October 30, 2013. The maximum allowance provided by law for FMLA is 12 weeks, resulting in an expiration date of January 21, 2014.
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> Your physician did not release you to return to work upon the expiration of your FMLA period on January 21, 2014. We are in receipt of your physician's note dated January 20, 2014 recommending that you continue to be out of work for at least 12 weeks. Northfield granted you an extension to your leave in accordance with the terms of the "Medical Leaves of Absence" policy for a period of 30 days, expiring on February 21, 2014.
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> It is expected that you will return to work and assume your position as CSR on Monday, February 24, 2014. We regret to inform you that if you are unable to return to your position on that date you will need to resign from your position as CSR with Northfield Bank.

See Letter from Silva to Complainant, Feb. 18, 2014.

On February 21, 2014, Complainant called Silva to discuss the letter. The parties dispute the substance of that conversation. Respondent claims that Complainant "said that she was not sure if she wanted to return" and "advised [Silva] that she did not want to return to work on or about March 12, 2014, and stated that she would submit a resignation letter to Silva and pick up her belongings from the branch on February 24, 2014." See Respondent's Statement of Position, Sep. 17, 2014, p. 5. Respondent also claims that Complainant stated, "[T]he doctor will put me back to work when I tell him to." Ibid.

Complainant, on the other hand, claims that she told Silva that she had a doctor's appointment on March 11, 2014, and would ask her doctor if she could be cleared to return to work with restrictions the next day, i.e., March 12, 2014. She claims that she also offered to take another position at another branch. During the course of the DCR investigation, Complainant produced what she purported to be a recording of the conversation, which appears to be incomplete. She states on the tape that she is confident that her doctor will clear her to return ("It's not like I'm picking up physical labor . . . I don't have to go out and pick up boxes for a living. I'm not a truck driver."). She states, "I'm just asking for like two more weeks."

When the voice on the recording, presumably Aline, tells her that they need to fill the position immediately because the branch manager is performing the CSR work, Complainant asks if she can be placed in "another position at another office." She is told no. The voice on the recording can be heard suggesting that Complainant submit a resignation letter. Complainant refuses. The voice replies, "So then you'll be terminated either way."

On February 26, 2014, Respondent wrote to Complainant, memorializing that her employment had been terminated effective February 24, 2014. See Letter from P. Gallucci, Senior HR Rep., to Complainant, Feb. 26, 2014.

On March 19, 2014, Complainant's lawyer wrote to Respondent seeking to "explore an amicable resolution" to Complainant's potential LAD claims. See Letter from R. Daniel Bause, Esq., to Respondent, Mar. 19, 2014.

The next month, Respondent offered to reinstate Complainant as a CSR at its Linden branch. Complainant declined. Respondent memorialized the discussion in an email to Complainant's attorney, which stated in part:

> On April 3, 2014, Northfield Bank extended an offer to [Complainant] to work in a CSR position located at its Linden branch. [Complainant] would have been reinstated with no break in service and at the same rate of pay. You initially indicated that [Complainant] was interested and could start as early as April 9, 2014.
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> On April 8, 2014, you advised me that [Complainant] has not been released to return to work, and cannot work until mid-May. I advised you that the Bank cannot hold the Linden position open that long, and that [Complainant] may apply for open positions at the Bank whenever she is released to return to work.
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> [See Email from K. Russo, Esq. to D. Bause, Esq., April 8, 2014, 2:17 p.m.]
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> On April 14, 2014, Respondent filled Complainant's position.

During the course of the DCR investigation, Complainant produced a note from Matthew J. Garfinkel, M.D., dated October 16, 2014, stating, "I offered on 3/11/14 her to return to work modified duty with no lifting or pushing with right arm and no lifting overhead."

During the November 12, 2014, fact-finding conference, Silva stated, "[E]ven after we terminated her, I told my recruiter not to start recruiting yet, and to wait a little bit to see if [Complainant] would provide us with documentation saying she could return . . . If she had come to me with a doctor's note on March 11, I would have undid everything I did in the system and reinstated her. . . She never, ever reached back out to me." Complainant acknowledged that she never presented Respondent with a doctor's note clearing her to return on March 12, 2014. She argued, "Why would I give them a doctor's note when they had already fired me?"

Analysis

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

It is settled that an employer cannot discriminate against an employee in the terms, conditions, or privileges of employment based on that person's actual or perceived disability. N.J.S.A. 10:5-12(a). It is equally settled that an employer must make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b).

To determine what accommodation is necessary, the employer must "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). Once an employee with a disability requests assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Ibid.

An employer will be deemed to have failed to participate in the interactive process if (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400 (citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a); cf. Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation").

Moreover, an employer is required to assess each individual's ability to perform a particular job "on an individual basis." N.J.A.C. 13:13-2.5(a). An employer cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. Super. 363, 383 (1988); Greenwood v. State Police Train. Ctr., 127 N.J. 500 (1992).

An accommodation is not "reasonable" and therefore not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; (c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3).

Here, Respondent argues that Complainant was never subjected to any adverse employment action, but rather resigned voluntarily. It argues that during the February 21, 2014, telephone discussion, Complainant "said that she was not sure if she wanted to return" to work and "advised [Silva] that she did not want to return to work on or about March 12, 2014, and stated that she would submit a resignation letter to Silva and pick up her belongings from the branch on February 24, 2014." See Respondent's Statement of Position, supra, at 4. Elsewhere Respondent argues, "Complainant repeatedly indicated to Respondent that she did not want to return to work, preferring instead to collect disability benefits and unemployment benefits." Id. at 7.

However, on the recording produced by Complainant, she appears to state without equivocation that she wants to return to work but would like an extension until March 12, 2014 and/or a reassignment to another branch. There is no indication that Complainant offered to resign.

Respondent argues that accommodating Complainant would have imposed an undue hardship on it operations because her absence impacted the branch's ability to meet its "quarterly Demand Deposit Account/Checking (DDA) goals." See Respondent's Response to Request for Information, p. 3, Dec. 3, 2014. It wrote:

> Prior to Complainant's leave of absence, the Branch successfully met its DDA goals . . . During Complainant's leave of absence, the Branch was short-staffed because it was without a CSR. As a result, the Branch did not meet its DDA goals . . . Upon filling Complainant's CSR position in April 2014, the Branch successfully met its DDA goals.

Id. at 3-4. To support that assertion, Respondent submitted a document stating that during the two quarters when Complainant was absent (i.e., Quarter 4, 2013 and Quarter 1, 2014), the Westfield branch failed to meet its financial goals. However, that document also indicates that the Westfield branch failed to meet its financial goals when Complainant was present (i.e., Quarter 3, 2013).

Respondent argues that in Complainant's absence, the Branch Manager was forced to perform the CSR's tasks instead of working to expand the business. Respondent states:

> [T]he Westfield Branch was a new branch opened by Northfield in 2012. The location was a new one for the Bank and it was the Branch Manager's responsibility to build customer relationships and bring in new business. Due to Complainant's extended absence, it was difficult for the Branch Manager and Assistant Branch Manager to do so. The CSR is a critical role to the Branch as it is the only position aside from the Branch Manager and Assistant Branch Manager that can open customer accounts (i.e., savings, checking, CD, etc.) Tellers are not cross-trained to open customer accounts. The absence of the CSR at any time creates a hardship to the Branch because either the Branch Manager or Assistant Branch Manager must be physically present to open accounts and refer customers. Due to its small size, the absence of any Branch employee for an extended period of time caused an undue hardship to the Branch, particularly the CSR position given her specialized skills.
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> [See Respondent's Responses to Requests for Info., supra, at 4]

The fact that Silva claims to have instructed her recruiters to refrain from searching for a replacement, although not conclusive, perhaps undercuts the argument that extending Complainant's leave to March 12, 2014, would have resulted in an undue hardship on the business's operations. On the other hand, Silva can be overheard on the recorded telephone conversation telling Complainant that the Branch Manager, Maria Fuentes, is needlessly preoccupied handling CSR duties instead of working to grow the business:

> They're not doing so great right now. They're not meeting their goals. And one of the reasons is because Maria is not able to lead the branch because she has, you know, there has to be coverage for the CSR position . . . [W]e need to fill that position right away. We need to get someone in there so that Maria can go back out and build Westfield. And it's just something that has grown, you know, throughout the last couple of months. She hasn't been able to because she's just covering for that and it's really doing an undue hardship to the branch. And it's just, we just can't hold it for any further.
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> It has nothing to do with you. It really has to do with the hardship with the branch. It's just a branch that is struggling right now. And we really really need for Westfield to come up with their numbers so that Maria can hit her numbers . . . and be successful at that branch . . . [N]ot having a CSR is just too much for us right now.

Silva told DCR that she was "skeptical" that Complainant would ever return to work. She noted that Complainant presented contradictory information. Silva stated that Complainant said, "I can tell the doctor to put me back whenever I want" on the one hand, but presented a medical note stating that she would not recover from surgery until mid-May, on the other. Silva said, "So it seemed untruthful to me." Indeed, Silva can be heard on the recorded telephone conversation expressing doubt that Complainant will actually return to work on March 12, 2014. Silva states:

> The issue is that you basically, each time that I have a conversation with you, we have to extend your leave more and more. Right now, you know there is no CSR and its been, clearly over the FMLA period . . . On March eleventh, what's going to happen when you call me and say, "I need another fifteen weeks, and another fifteen." Like, there's only so much that we can . . . extend the leave for.
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> * * *
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> . . . I guess my biggest concern right now to be perfectly honest is that there is a note here stating that there's gonna be a twelve week recovery time from your surgery, which was performed on 2/5. Your surgery then was performed on 2/10. Twelve weeks after that, you're well in to April . . . Why is there a difference in information now?

Skepticism, without more, is not actionable under the LAD. But if Respondent had doubts about whether Complainant would be able to perform the essential functions of her job, it could have put those questions to Complainant and her medical providers. It could have asked Complainant to be examined by its own doctors to gauge her fitness for duty.

Based on the above, the Director finds, for purposes of this disposition only, as follows: When Complainant asked Respondent to extend her leave for an additional two weeks and/or to transfer her to a different position at a different location, she was requesting an accommodation. That request triggered her employer's obligation to engage in an interactive process. Respondent has not shown that it engaged in that process or that granting such accommodations would have imposed an undue hardship on its operations. Respondent cannot take refuge in the fact that Complainant "never, ever reached back out" to Silva with updated medical information after she was discharged.

Respondent may ultimately persuade a fact-finder that it acted with no discriminatory animus, that there was no adverse employment action, that its actions were reasonable under the circumstances and/or that the requested accommodations would have resulted in an undue hardship. Moreover, Complainant's purported rejection of the offer to be reinstated with no break in service may significantly undercut any claim for damages. However, at this threshold stage of the process, the Director finds that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. In other words, it is found that PROBABLE CAUSE exists to credit the allegations that Respondent violated the LAD.

DATE: 12-18-14

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS